Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA, DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF ACCOUNTANCY,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Appeals Of Florida For The First District

BRIEF AMICI CURIAE OF THE INTERNATIONAL BOARD OF STANDARDS AND PRACTICES FOR CERTIFIED FINANCIAL PLANNERS, INC., AND CENTRAL FLORIDA SOCIETY, SOUTH FLORIDA SOCIETY, AND SOUTHWEST FLORIDA SOCIETY OF THE INSTITUTE OF CERTIFIED FINANCIAL PLANNERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CONSENT OF THE PARTIES

Petitioner, Silvia S. Ibanez, and Respondent, State of Florida, Department of Business and Professional Regulation, Board of Accountancy, have consented to the participation of the International Board of Standards and Practices For Certified Financial Planners, Inc., and the Central Florida Society, the South Florida Society and the Southwest Florida Society of the Institute of Certified Financial Planners, in these proceedings as amici curiae in support of the petition for writ of certiorari. Their consents have been filed with this Court.

INTEREST OF AMICI CURIAE

The International Board of Standards and Practices for Certified Financial Planners, Inc. (IBCFP) is a private, not-for-profit standards-setting, credentialing, licensing and disciplinary body for Certified Financial Planner and CFP licensees. The mission of the IBCFP is to benefit and protect the public by setting qualifications for initial professional certification, protect its federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER, to develop and administer continuing post-certification requirements and disciplinary procedures for licensees, and to encourage both certification attainment and certification retention of those persons licensed, thereby enhancing the professionalism of those engaged in the exercise and pursuit of financial planning.

The nature and function of the IBCFP organization is more fully described as follows. IBCFP identifies the body of knowledge in the field of personal financial planning; sets the core curriculum for the field based on national job task analyses of persons in the practice of personal financial planning; develops and administers national certification examinations which tests entry level

competency of those desiring to earn the IBCFP professional designation; registers educational institutions (presently over forty-nine colleges and universities have registered their programs), that provide the prerequisite personal financial planning educational programs required for certification; promulgates a Code of Ethics and Professional Responsibility to which all licensees are obliged to subscribe; and administers disciplinary action up to and including revocation against those licensees violating its code of ethics. In its initial licensure requirements, in its post-certification requirements, and in its requirements to comply with the IBCFP Code of Ethics and Professional Responsibility, the IBCFP demands professionalism of its licensees.

The CFP and CERTIFIED FINANCIAL PLANNER marks were first placed in commerce during the early 1970's by the College for Financial Planning, a Denver-based educational institution. They are distinct, federally registered service marks, which are not synonymous with one another. The IBCFP was created by the College for Financial Planning and the Institute of Certified Financial Planners in 1985 and was given ownership of the federally registered service marks, CFP and CERTIFIED FINANCIAL PLANNER, in 1986. By 1988, it could be said that "the CFP designation was the most prominent professional qualification of planners and product sales employees, held by 26% of the planner employees and 25% of the product sales employees . . . . The CFP designation appears to be developing as the most recognized designation in the planning field."[1]

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[1] *See* Financial Planners: Report of the Staff of the United States Securities and Exchange Commission to the House Committee on Energy and Commerce's Subcommittee on Telecommunications and Finance, 53 (February 1988) (Financial Planners Study).

The IBCFP at present has approximately 27,000 persons nationwide which it has licensed to use both of its marks (CFP and CERTIFIED FINANCIAL PLANNER), all of whom have met its examination, experience, education and ethics requirements, and who continue to meet its post-certification requirements which include continuing education requirements. Approximately 4,500 of these persons are dually licensed both as Certified Public Accountants (CPAs) and CFP licensees. In the State of Florida, approximately 1,400 persons are CFP licensees and over 200 are additionally licensed as CPAs.

An applicant for the CFP or CERTIFIED FINANCIAL PLANNER designation, such as the Petitioner (Ibanez) must complete an educational program registered with the IBCFP in six general areas of personal financial planning, must have experience in the area of financial services, must pass a rigorous examination on these six subject matter areas of personal financial planning, and must not only sign an ethics declaration agreeing to abide by the IBCFP Code of Ethics and Professional Responsibility, but must also disclose any previous or then-existing ethics violations or investigations by any regulatory or self-regulatory organization.

By virtue of its ownership of the federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER, the IBCFP controls, and is obligated to control use of its marks by licensing their use only to those who meet its requirements, as previously described. The IBCFP has not delegated or assigned control and oversight of its ownership rights in these marks to any State body, specifically not to the State of Florida, Department of Business and Professional Regulation, Board of Accountancy

(BOA). The CFP mark neither states nor implies that the holder has received formal recognition in any other field or specialty. Indeed, personal financial planning is generally considered to be a completely separate profession. Specifically, the CFP mark is not considered by the IBCFP to be a specialty of the practice of public accounting or to be a specialty of CPAs. The American Institute of Certified Public Accountants (AICPA), which is a national voluntary membership organization of CPAs, has more recently developed its own specialty designation for its members who meet its requirements which is called "Personal Financial Specialist". That designation is awarded by the Specialization Accreditation Board of the AICPA and is in no way connected with the IBCFP designations, CFP and CERTIFIED FINANCIAL PLANNER.

The Central Florida Society, the South Florida Society and the Southwest Florida Society of the Institute of Certified Financial Planners (Florida Societies) are affiliated societies of the Institute of Certified Financial Planners (ICFP). The ICFP is a not-for-profit membership association of CFP licensees that calls on its members to aspire to the highest levels of ethical conduct, personal development, professional competence, and service to the public. The Societies are local bodies which assist the ICFP in pursuit of its goals for member education and public awareness by providing a credible source for financial planning information and for promotion of the CFP licensees to members, the general public and regulators. Membership in the Central Florida Society of the ICFP currently numbers approximately 110 CFP licensees, in the South Florida Society 77, and in the Southwest Florida Society 33. Many of their members are CPAs in addition to being CFP licensees.

It is the mutual concern of the IBCFP and the three Florida Societies that if this order of the BOA is permitted

to stand, it will establish an unfortunate precedent in each of the following respects, which this Court should not condone or affirm:

(1) If other disciplines are permitted to enforce a blanket suppression on use of the CFP and CERTIFIED FINANCIAL PLANNER credentials, by persons qualified by the IBCFP to use the marks, consumers will be denied information as to professionally qualified planners who are best able to help them with their problems. Consumers will suffer because: (a) they are unable to ascertain professionals with the most appropriate qualifications; and (b) because this precedent will discourage additional financial planners from seeking the additional qualifications and self-regulatory constraints that the CFP designation represents.

(2) Beyond the immediate infringement of Ibanez's First Amendment rights, this order poses imminent and significant dangers to important First Amendment rights of each of the 200 CPA-CFP licensees practicing in Florida, and exposes each to similar risk of unwarranted discipline.

(3) In addition, because of the likelihood of nationwide publicity about the BOA's order, all of the 4,500 CPA-CFP licensees who practice outside the State of Florida stand to be placed at similar risk of losing important First Amendment rights as other states may seek to emulate the Florida BOA action.

STATEMENT

Petitioner, Silvia S. Ibanez, is a practicing attorney and a member of the Florida Bar since 1983. Petitioner (Ibanez) is also a licensed Certified Public Accountant (CPA). Ibanez was licensed to use the marks CERTIFIED FINANCIAL PLANNER and CFP in 1989. Ibanez has been actively licensed as a CFP licensee in good standing

with the IBCFP, the recognized licensing authority for the CFP credential. Pet. App. 25a. The IBCFP was created to improve the quality of financial planning by providing a national credentialing process. The IBCFP certifies individuals who meet specified standards of experience, education and ability in financial planning.

Ibanez was listed in the "Attorney" yellow pages as "Ibanez, Silvia S., CPA, CFP." She was also listed in the white pages as "Ibanez, Silvia S., CPA, CFP, atty." *Id.*, at 26a.

A person anonymously mailed to the BOA a copy of the yellow pages, which included Ibanez's listing, and circled her name. The BOA then instituted disciplinary action against Ibanez. The basis for the discipline is violation of F.A.C. 21A-24.001 which prohibits CPAs, inter alia, from advertising any "form of recognition by any entity other than the board that uses the term 'certified' . . . ." *Id.*, at 5.

On January 15, 1992, a hearing officer issued a recommended order that all charges against Ibanez be dismissed. *Id.*, at 7. The BOA subsequently disregarded the recommendation and found Ibanez in violation of Rule 21A-24.001. *Id.*, at 9. Ibanez appealed, but the decision was affirmed per curiam. *Id.*, at 10.

SUMMARY OF ARGUMENT

1. Truthful statements of certification, professional qualifications, and specialization are valuable commercial information. The BOA's categorical prohibition of truthful certification claims by CPAs and restrictions on the use of specialization claims violate the standards for commercial speech under the First Amendment. Certification provides valuable information to consumers concerning the nature of services available from competing professionals. Claims of certification are true and verifiable and,

absent evidence to the contrary, they are not actually or inherently misleading. Although claims of certification have the potential of misleading, this does not justify a state's regulation categorically prohibiting the use of such claims.

2. The BOA's restrictions on truthful professional and specialization claims, which are not within the practice of public accounting, further violates the First Amendment. Such restrictions go well beyond the proper scope and extent of restrictions designed to achieve a legitimate governmental interest.

3. The BOA's rule prohibiting CPAs from advertising the fact that they are certified by anyone other than the BOA insulates CPAs from competition in violation of the Sherman Act and, as such, is an unfair method of trade in violation of the Federal Trade Commission Act. The BOA's rule barring CPAs from advertising their validly held CFP designations increases consumer difficulty in finding the least expensive CPA with the most relevant knowledge. CPAs, thus, have no incentive to price competitively.

ARGUMENT

I. Certified Public Accountants have a constitutional right, under the standards for commercial speech, to advertise their truthful certification by the IBCFP as a CFP and CERTIFIED FINANCIAL PLANNER licensee.

Although the First Amendment provides less protection to commercial speech than to non-commercial speech, this Court has recognized the importance of commercial speech in a competitive market. Commercial information enables consumers to make better informed judgments in procuring services of professionals. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1976). In recognition of

the importance of commercial speech, this Court's approach has been that states may only proscribe dissemination of commercial speech which is false, misleading or deceptive. *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265 (1985).

Commercial speech which is not false, misleading or deceptive and does not concern unlawful activities may be restricted (a) only to achieve a substantial government interest, and (b) only with restrictions that directly advance that interest, and (c) are no more extensive than necessary to effectuate that interest. *Central Hudson Gas and Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

Recently, in *Peel v. Attorney Disciplinary Commission of Illinois*, 496 U.S. 1989 (1990), this Court considered the validity under the First Amendment of a disciplinary rule adopted by the State of Illinois which prohibited attorneys from claims of certification and specialization.

Peel, an attorney licensed to practice in Illinois, Arizona and Missouri, placed on his letterhead stationery, between his name and the states in which he was licensed to practice, the following statement: "Certified Civil Trial Specialist by the National Board of Trial Advocacy." *Id.*, at 96. The Attorney Registration and Disciplinary Commission of Illinois (ARD) found Peel in violation of the rule prohibiting attorneys from claiming specialization and certification and recommended censure. *Id.*, at 97.

On review, this Court's analysis began with the observation that advertising was a form of commercial speech protected by the First Amendment. *Bates v. Arizona*, 433 U.S. 350 (1977). Although the First Amendment protects truthful advertisements, misleading advertising may be entirely prohibited. Further, states may not place an absolute prohibition on advertising that is potentially misleading if the information may be conveyed in a way

that would not be deceptive. However, even non-misleading advertisements may be regulated, but the state must assert a substantial interest and the interference must be in proportion to the interest served. *In re R.M.J.*, 455 U.S. 191 (1982).

This Court then held that Peel's certification was true and verifiable. *Peel*, 496 U.S., at 100. Peel's claim of certification was not actually misleading because there were not factual findings of actual deception or misunderstanding. *Id.*, at 106. Although this Court concluded that claims of certification "may not be fully understood" by consumers and, therefore, may be potentially misleading, the state's blanket prohibition was broader than necessary to prevent the harm. *Id.*, at 107. "Even if we assume that petitioner's letterhead may be potentially misleading to some consumers, that potential does not satisfy the state's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Id.*, at 109.

This Court then specifically stated: "A State may not . . . completely ban statements that are not actually or inherently misleading, *such as certification as a specialist by a bona fide organization* such as NBTA." *Peel*, 496 U.S., at 110.

A. The Board of Accountacy regulation prohibiting "certified" is analogous to the fact situation of Peel and therefore is unconstitutional.

In *Peel*, this Court held unconstitutional the ARD's rule categorically prohibiting use of truthful certification by a bona fide national organization. This Court reasoned that the ARD's categorical prohibition of the term "certified specialist" did not satisfy the *Central Hudson* test and

was, therefore, unconstitutional. Although the government interest of protecting consumers from false or misleading advertising is substantial, this Court held that an absolute prohibition was more extensive than necessary to effectuate that interest.

As in *Peel*, the BOA promulgated F.A.C. 21A-24.001 1(i), a blanket prohibition on the use of the term certified, on grounds of protecting the public from false and misleading advertising. Ibanez, like Peel, holds a certification (CFP) from a bona fide national organization (IBCFP). Ibanez lists her CFP designation on her letterhead, business card and in the yellow pages. The BOA like the ARD in *Peel*, seeks to discipline Ibanez for the use of truthful, commercial speech.

The importance of truthful, commercial free speech in the field of financial planning is even more important than in other fields because of consumer needs and marketplace forces. Financial planning and other types of investment advisory services are in demand by consumers at all levels of income and sophistication.[2] Because of the exponential growth in the industry and its relative lack of regulation, the opportunity for clients of all sizes and levels of sophistication to be harmed is significant. (*Ibid.*) At present, the principal government regulatory mechanism for financial planners occurs under the SEC administered Investment Advisers Act of 1940, and under similar state statutes. Unqualified financial planners are a significant problem (*Id.* at 20) for consumers, and the existence of an ascertainable, independent certification in this field is valuable and rare in a competitive marketplace. So is full disclosure of material information about the financial planning practitioner to

[2] *See* H.R. Rep. No. 103-75, 103D Cong., 1st Sess. 18 (1993).

consumers. Under the IBCFP *Code of Ethics and Professional Responsibility,* disclosure required of CFP licensees exceeds requirements under federal and state regulations.

One of the purposes of the IBCFP is to lessen the burden of government by cooperating with and assisting state and federal regulatory agencies to appropriately, effectively and uniformly regulate professional financial planners. Present regulation of financial planners is not adequate because it is not sufficiently comprehensive, and fails to incorporate diverse disciplines such as securities, insurance and banking which are merging into one field of financial service and financial planning. As explained in the Interest section, above, the CFP designation is designed to answer the need for qualified and competent financial planners, by establishing comprehensive certification criteria which help set CFP licensees apart from other financial planners, and by positioning the IBCFP as the standard-setting organization for CFP licensees. The BOA rule will deny all 200 Florida CPA-CFP licensees the ability to identify themselves as CPA-CFP licensees to Florida consumers who are thereby denied access to this important information.

As in *Peel*, the BOA's blanket prohibition of certification claims is broader than necessary to achieve the governmental objectives and may not stand.

B. The present case is also distinguishable from *Peel* and is, therefore, more offensive to commercial speech.

The BOA has no statutory authority to regulate other professions, such as financial planning, over which the BOA has no jurisdiction. The BOA's Rule 21A-24.001(1)(g)-(j) raises additional issues which directly affect the First Amendment rights of the approximately

200 CPA-CFP licensees who practice in the State of Florida.

The IBCFP has not sought approval of the CFP designation from the State of Florida Board of Accountancy as referred to in paragraph 1(g) of Rule 21A-24.001, F.A.C., nor does the IBCFP plan in the future to request such approval for Florida CFP licensees, either for those who are also CPAs or not. The reason that the IBCFP has not in the past requested such approval, nor plans to do so in the future, is because the IBCFP believes that it, and it alone, has the right to control the use of its federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER. The IBCFP believes that the BOA (or any other private or government entity) does not have the right to control the use of its marks. The profession of personal financial planning is separate and distinct from the practice of public accountancy just as is the practice of law, architecture and engineering.

There are several important issues here. The BOA rule prohibits the use of specialty designations in any aspect of the practice of public accountancy unless the advertisement states that the use of the term is a self-designation and/or is not sanctioned by the state or federal government. The only exception is if the terms and recognition have been approved by the BOA and, to our knowledge, no such terms or recognition have been so approved.

The BOA also presumes to make personal financial planning a subset of the practice of public accountancy. The IBCFP maintains this is clearly not the case. It is a completely distinct and separate profession from that of public accountancy.

In addition, the CFP and CERTIFIED FINANCIAL PLANNER marks are federally registered marks owned by the IBCFP, as indicated earlier. The IBCFP, and only

the IBCFP, can control the use of its marks. Any interference by any other organization or regulatory authority in the free use of these marks in interstate commerce constitutes an abridgement of our licensees' commercial free speech rights to provide truthful information to the public about designations or licenses that they have in fact earned. And, any attempt to control the free use of a professional designation actually earned and currently owned is, per se, anticompetitive in nature.

In measuring its rules and decision in this case against this Court's test for regulations on protected commercial speech, set forth in the *Central Hudson* case, the BOA claims that its rules are a "reasonable fit" (Pet. App. 13a, 19a) between the public good and the limitations it has imposed on commercial speech. We believe this BOA assessment is in error. It is in error when it claims use of CFP by the Petitioner was inherently deceptive and misleading advertising. Furthermore, it is in error in claiming a "reasonable fit." The restraining effect of its orders and its rules on the use of the CFP designation, a legitimate and recognized certification and designation, utilized in a field which is distinct from the practice of public accountancy, surpasses by a wide margin the *Central Hudson* standards for the proper scope and extent of restrictions designed to achieve a legitimate governmental interest.

II. The Board of Accountancy's restriction prohibiting Certified Public Accountants from listing their CFP and CERTIFIED FINANCIAL PLANNER designation in advertising is anticompetitive in violation of the Sherman Antitrust Act and the Federal Trade Commission Act.

Petitioner's appellate briefs to the Florida District Court of Appeals, First District, in addition to reiterating

First Amendment issues discussed above, have asserted that the BOA's restriction on her truthful use of CPA and CFP designations is anticompetitive and interferes with interstate commerce. Pet. 11-12. While there was no ruling in that court, and the BOA did not rule on this issue, it remains important to ask if the BOA, in issuing its decisions and its rules in the present case, has acted solely out of concern for the public interest.

The Sherman Antitrust Act, 15 U.S.C. §§ 1-7, makes agreements "in restraint of trade" and "monopolization" illegal. Its purpose is to maintain competition as the rule of American trade and commerce. It is based on the belief that competition results in the best allocation of resources and stimulates research and development.

The Federal Trade Commission Act (FTCA), 15 U.S.C. §§ 41-77, created the Federal Trade Commission (FTC). The FTC is responsible for the interpretation and enforcement of the FTCA and the Sherman Act. Section 5 of the FTCA, 15 U.S.C. § 45(a)(1), makes unlawful any unfair methods of competition.

The Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . " 15 U.S.C. § 1 (1982). If the state regulation is the product of a "combination" or "conspiracy" and is unreasonably anticompetitive, it violates § 1 of the Sherman Act. State boards have previously been held to constitute combinations or conspiracies whose acts are scrutinized under the Sherman Act. *Rhode Island Board of Accountancy*, 107 F.T.C. 293 (1986); *Montana Board of Optometrists*, 106 F.T.C. 80 (1985). Similarly, the Florida Board of Accountancy constitutes a combination or conspiracy under the Sherman Act.

The next step in the analysis is to inquire whether the regulation is unreasonably anticompetitive. Advertising is vitally important in a competitive market. It informs

consumers of price, quality, and quality of goods and services. It plays an "indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364. Restraints on truthful advertising for professional services are inherently likely to produce anticompetitive effects. *Massachusetts Board of Registration in Optometry*, No. 9195 (Initial Decision F.T.C. June 23, 1986). Florida's rule banning CPAs from using their CFP credential increases the consumer's difficulty in finding the most inexpensive CPA with the most relevant knowledge. As a result, CPAs are isolated from competition, and there is no incentive to price competitively.

This Court has developed two doctrines to determine whether regulations are unreasonably anticompetitive, the "*per se* and the *rule of reason* doctrines. The *per se* rule is applied when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.' *Broadcast Music, Inc., v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). In such circumstances, a restraint is presumed unreasonable without inquiry into the particular market context in which it is found." *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 100 (1984).

Under the rule of reason, the test for legality is whether the restraint merely regulates an industry or whether it suppresses and destroys competition. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). The Board's rule prohibiting CPAs from using validly obtained certification in advertising may have been intended to regulate the profession, but it clearly suppresses competition among CPAs in taking away the competitive advantage that a CPA-CFP licensee has over a CPA. Because the restraint has anticompetitive effects, under the *rule of reason* doctrine the BOA has a heavy burden to demonstrate the existence of a procompetitive

justification. NCAA 468 at 113. Absent this countervailing procompetitive interest, the BOA's regulation limiting consumers' choice by impeding access to pertinent information cannot survive.

Section 5 of the FTCA makes unfair methods of trade illegal. Violations of the Sherman Act are violations of Section 5 of FTCA. *F.T.C. v. Cement Institute*, 333 U.S. 683 (1948).

This Court has created an exception to the antitrust laws for action taken by or at the direction of state governmental bodies, the "state action doctrine." *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), held that when a state legislature adopts legislation, its actions constitute those of the state and are exempt from the antitrust laws. Subsequently, this Court held that actions of a state supreme court acting legislatively, rather than judicially, are immune from the Sherman Act under the state action doctrine as well. *Bates v. State Board of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). It is clear that where the action is by the state legislature or court, the exemption is complete without further inquiry. *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. (1989), 80 L.Ed.2d 590 (1984).

Closer scrutiny is required where the activity is not carried out by the legislature or Supreme Court, but is carried out by others pursuant to state authorization. *Community Communication Co. v. Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *California Retail Liquor Dealer Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). "A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the state provides active supervision of anticompetitive

conduct undertaken by private actors." *F.T.C. v. Ticor Title Ins. Co.*, 112 S.Ct. 2169, 2175 (1992).

The Florida laws do give several legislative directives to the Florida BOA but they do not articulate a "clear and affirmative" policy to allow anticompetitive conduct. They are as follows:

A. Sec. 473.304 Fla.Stat. – Rules of Board
   The board shall adopt all rules necessary to administer this act. Every licensee shall be governed by this act and the rules adopted by the board.

B. Sec. 473.323(1)(f) Fla.Stat. – Disciplinary Proceedings
   (1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:
   . . .
   (f) advertising goods or services in a manner which is fraudulent, false, deceptive, or misleading in form or content;

C. Sec. 455.201 Fla. Stat. – Professionals and Occupations regulated by the Department of Professional Regulation; legislative intent.
   . . .
   (2) The Legislature further believes that such professions shall be regulated only for the health, safety and welfare of the public under the police powers of the state. Such professions shall be regulated when:
   (a) Their unregulated practice can harm or endanger the health, safety and welfare of the public, and when the potential for such harm is recognizable and *clearly outweigh any anticompetitive impact* which may result from licensing. (emphasis added).

. . .

> (3) No board within the Department of Professional Regulation shall create unreasonably restrictive and extraordinary standards that deter qualified persons from entering the various professions. *No board shall take any action that tends to create or maintain an economic condition that unreasonably restricts competition, except as specifically provided by law* (emphasis added).

These laws in no way manifest a clear intent to create an anticompetitive atmosphere. Because there is no clear intent by the legislature, the BOA cannot claim immunity under the state action doctrine. Therefore, their regulation is subject to both the Sherman Act and the FTCA, and under either the regulation is prohibited.

CONCLUSION

The BOA's order and regulations prohibiting CPA-CFP licensees from advertising their claims of certification is in violation of important First Amendment protections for commercial speech and is anticompetitive in violation of the Sherman Act and the Federal Trade Commission Act. Clarity and consistency of rulings in this area are necessary, and hence this Court should grant Ibanez's petition for writ of certiorari.

Respectfully submitted,

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